No. 77-1540

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN TELEPHONE AND TELEGRAPH COMPANY

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QUESTIONS PRESENTED

1. Whether it would be premature for this Court now to consider whether the Federal Communications Commission has authority, despite the unequivocal requirements of the Communications Act, 47 U.S.C. §§ 151, *et seq.*, to decline to regulate certain common carriers, when the Commission itself deferred any consideration of that issue and when any disposition of the issue cannot now alter the policy choices embodied by the Commission in the orders here under review.

2. Whether the Court of Appeals properly sustained the decision of the Federal Communications Commission that resellers of private line telecommunications

services will be engaged in common carriage under the Communications Act, 47 U.S.C. §§ 151, *et seq.*, where such resellers will provide telecommunications facilities and services, engage in the receipt, forwarding and delivery of communications, and offer for hire to the general public a resulting package of telecommunications services.

STATEMENT

This case arises from petitions to review various aspects of orders issued by the Federal Communications Commission.[1] Those orders principally required the elimination of long-established provisions in the tariffs of telephone companies and other common carriers restricting the resale and sharing of private line telecommunications services. Among other consequences, the Commission expected the elimination of such restrictions to result in the development of a new "tier" of resellers of private line services. It held that such resellers will be common carriers under the Communications Act, 47 U.S.C. §§ 151, *et seq.* It examined their activities and characteristics, and prescribed the form and extent of regulation of resellers which it found to be in the public interest. In addition, the Commission held that, unlike reselling, non-profit agreements among customers to share private line telecommunications services do not constitute common carriage under the Act. The only issues presented by this petition concern the Commission's decision that it

[1] The Commission's Report and Order in *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, released July 16, 1976, is reprinted in Appendix B to the petition. The Commission's subsequent Memorandum Opinion and Order on reconsideration, released January 12, 1977, is reprinted in Appendix C to the petition.

should regulate resellers as common carriers under the Act.[2]

The Commission made careful findings as to the nature and activities of private line resellers. (App. 77b-101b.) It found that resellers include not merely brokers or wholesalers, but also "processors," who will offer for hire to the public a "package" of communications services and facilities. (App. 21b-22b.) Although processors will lease facilities from existing carriers, all or many of them will also construct or purchase substantial additional equipment or facilities of their own. (App. 86b.) In any event, they will retain "continuous control" over the telecommunications circuits and facilities leased to them by telephone companies and other carriers. (App. 21b.) The Commission observed that at least since *MacKay Radio & Telegraph Co.*, 6 F.C.C. 562 (1938), it has consistently held that the fact that telecommunications services are provided over leased facilities, rather than facilities owned by the offeror, does not prevent regulation of the offeror as a common carrier. (App. 84b-85b.) On the basis of these and other findings, the Commission concluded that there will be "no difference" between the activities of resellers and "traditional communications common carriage." (App. 87b.)

Despite this conclusion, the Commission emphasized that if actual experience later shows that the public interest will be served by deregulation of resellers, it

[2] AT&T is separately filing a conditional cross-petition for certiorari in which it presents for review additional issues arising from the Commission's orders. For reasons set forth below, AT&T urges that this petition should be denied, but if it were to be granted, the Court should also grant the cross-petition in order to consider the closely interrelated issues presented there.

will be prepared to act "to the extent that the law allows it." (App. 86b.) Moreover, the Commission recognized that it has a degree of discretion as to the form and extent of regulation, and it considered carefully the scope of regulation over resellers which it deemed now to be in the public interest. (App. 87b-101b.) It stated that it would follow a policy of "open entry" by private line resellers, and held that applicants for entry into that field, unlike applicants to provide other common carrier services, would not be required to support their applications with evidence of the economic impact of their entry. (App. 92b.) Resellers need not make a specific showing that there is a public need for their service, nor that their service will be unique. (App. 89b.) In addition, the Commission concluded that it need not, at least for the moment, require specific tariff provisions relating to the quality of service offered by resellers. (App. 98b-99b.) In these and other respects, the Commission examined the particular characteristics of resellers to determine the precise form and extent of regulation under the Act which it regarded as appropriate.

The Commission's orders were the subject of several petitions for review. AT&T and other parties urged that the Commission's orders were for two independent reasons invalid insofar as they prohibited restrictions upon resale and sharing. First, they argued that the Commission had disregarded important procedural requirements imposed by Section 205(a) of the Act. Second, they emphasized that the prohibition was arbitrary, capricious and without support in the administrative record. Other parties asserted that other portions of the orders were invalid for different reasons. Among them was the petitioner here, which advanced two claims before the Court of Appeals. First, IBM

asserted that the Commission erred in concluding that resellers are subject to regulation as common carriers under the Act. Second, it claimed that, if resellers may be regulated as common carriers, the Commission should nonetheless have "forborne" completely from regulating them in accordance with the Act's requirements.

The Court of Appeals for the Second Circuit sustained the Commission's orders in their entirety.[3] With respect to IBM's claims, the Court of Appeals held unanimously that the Commission had properly concluded that resellers of private line services will be engaged in common carriage and that the form and extent of regulation selected by the Commission was not an abuse of its discretion. (App. 15a-20a.) The Court of Appeals pointed out that the Commission has long regulated as common carriers all persons "who offer communications service for hire, including those who merely lease facilities from existing carriers." (App. 15a.) It emphasized that even the definitional provisions of the Act relied upon by IBM expressly encompass activities of the kind in which resellers will be engaged. (App. 17a.) In these circumstances, it found no reason to reject the Commission's "long-standing interpretation of its own organic statute. . . ." (App. 18a.)

ARGUMENT

The only issues offered for review by this petition plainly do not warrant the attention of this Court. IBM mischaracterizes the policy decisions reached by the Commission with respect to the regulation of resell-

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[3] The opinion of the Court of Appeals is reprinted in Appendix A to the petition.

ers, and urges this Court to resolve an abstract question of statutory interpretation, the disposition of which cannot alter the regulatory policies embodied in the Commissions' orders. The asserted "conflict among the circuits" upon which IBM relies is illusory. IBM is mistaken even with respect to the proper resolution of the narrow question of statutory construction about which it prematurely seeks the advice of this Court.

IBM also urges this Court to consider whether the Commission properly concluded that private line resellers will be engaged in common carriage. For this purpose, it offers a definitional argument which disregards long-settled administrative practice, the express language of the Communications Act, and the Commission's factual findings as to the nature of resellers' activities.

I.

The Principal Issue Presented for Review by This Petition Is Premature and Inappropriate for Plenary Consideration by This Court.

The principal issue tendered for review by IBM is narrow and abstract. IBM acknowledges that it requests "only" a ruling that the Commission has authority "to forbear from regulating" resellers as common carriers under the Act. (Petition at 11.) It evidently assumes that such advice from this Court might induce the Commission to alter its understanding of the public interest so as to eliminate all regulation of private line resellers. In fact, IBM has seriously misunderstood the terms and bases of the Commission's orders. Despite the implication of IBM's argument, this is plainly not a situation in which the Commission reluctantly held that it was compelled by the Act to engage in otherwise needless forms of regulation.

The Commission expressly recognized that it has a degree of discretion as to the form and extent of regulation over resellers, and carefully selected the methods of regulation which it deemed appropriate in light of the public interest. (App. 87b-101b.)[4] It specifically stated that it would be prepared to consider additional steps to deregulate private line resellers if and when such steps appear to be in the public interest. (App. 87b.) Its decision now to require partial regulation of resellers was clearly based, not upon a statutory straitjacket of the kind imagined by petitioner, but its own evaluation of the current requirements of the public interest.[5]

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[4] IBM's claim that regulation has been imposed upon resellers without a "judgment . . . that regulation is desirable" (Petition at 16) ignores the Commission's careful efforts to tailor the form of regulation to its perception of the public interest. The Commission examined individually various forms of regulation, and adopted those which it deemed to be suitable. (App. 9b, 87b-101b.) It compared the activities of resellers with sharing arrangements, and reached separate and quite different conclusions with respect to the regulation of sharing. (App. 9b, 101b-110b.) In these circumstances, to assert that the Commission did not conclude that regulation of resellers is desirable is to render meaningless lengthy passages of the Commission's Report and Order.

[5] The Commission's two lengthy decisions in this matter referred only once and in passing to any statutory obligation to regulate resellers. (App. 96b-97b.) In that passage, which occurs in the Report and Order several pages after the Commission's conclusion that resellers are common carriers, and in the midst of its evaluation of the appropriate forms of regulation, the Commission merely referred to the statutory requirement that rates be just and reasonable and to the statutory prohibition against unjust or unreasonable discrimination. The passage certainly does not suggest, as IBM evidently imagines, that the Commission's policies with respect to the regulation of private line resellers were the result of its unwilling acquiescence in the Act's requirements, rather than the Commission's own assessment of the demands of the public interest.

The simple fact is that the Commission has not yet had any occasion to decide whether, as IBM now claims, it has discretion under the Communications Act entirely to deregulate resellers or any other category of common carriers. The Commission correctly recognized that the growth of a new tier of resellers will have far-reaching implications for the provision of private line telecommunications services. It postponed any consideration of its statutory authority, if any, to deregulate resellers until such time as actual experience shows that such steps would be in the public interest. For the moment at least, the Commission concluded merely that private line resellers are common carriers and that the public interest now requires various forms of regulation under the Act. In these circumstances, consideration by this Court of the issue of statutory construction urged by IBM can result only in premature and abstract advice.

Despite IBM's claim, there is no conflict among the circuits regarding deregulation which now requires resolution by this Court. Unlike this case, the two cases relied upon by IBM both involved the Commission's regulatory authority over CATV facilities. *Philadelphia Television Broadcasting Co.* v. *FCC*, 359 F.2d 282 (D.C. Cir. 1966); *American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975). In one of those cases, the Court of Appeals carefully emphasized the "very broad" authority over CATV which the Commission has been afforded by the decisions of this Court, and even suggested that the Commission's discretion with respect to CATV is not circumscribed by Titles II and III of the Act. *Id.*, 523 F.2d at 1351. Whatever the actual scope of the Commission's discretion in that unusual context, it has no direct or necessary relevance here.

Unlike the question urged for review by IBM, the issue in those cases was not whether common carriers could be released from any regulation at all under the Act, but instead what were the forms of regulation which were appropriate in the public interest over regulated activities. In both cases, the Courts of Appeals concluded that the forms of regulation selected by the Commission represented "rational" policy choices which, in light of the "deference" to which the agency is entitled, could not be overturned. *Id.* at 1350-51; 359 F.2d at 283-84. In this case, the issues considered by the Commission were whether it has jurisdictional authority over resellers as common carriers, and, if it has, how they should be regulated in the public interest. The Court of Appeals correctly held that the forms of regulation selected by the Commission did not represent an abuse of its discretion. (App. 20a.)

IBM acknowledges that it does not ask this Court to review the "substantive policy decision" reached by the Commission in this matter. (Petition at 11.) It does not seek review of the scope or extent of regulation imposed by the Commission upon resellers, or of the respects in which the Commission released resellers from forms of regulation which are otherwise applicable to common carriers under the Act. Instead, IBM now offers for review an arid question of statutory interpretation which was not decided in the Commission's orders and the resolution of which cannot affect the policy judgments reached by the Commission. Plenary review of such an issue would be an obvious misallocation of the limited resources of this Court.[6]

[6] In any event, IBM is plainly mistaken as to how that issue should be decided, if and when it is appropriate for review by this

II.

The Findings Made by the Commission as to the Business Activities of Resellers Show Clearly That They Were Properly Held to Be Common Carriers Under the Act.

IBM also urges this Court to consider whether the Commission properly concluded that private line resellers will be engaged in common carriage. In essence, IBM evidently assumes that it and other resellers will not be common carriers under the Act because they will lease communications circuits and other facilities from existing carriers, and might elect not to construct or purchase any facilities. IBM urges that, as a result, they will not themselves "transmit" communications by wire within the meaning of Section 3(a) of the Act, 47 U.S.C. § 153(a). The deficiencies of IBM's claim are many and severe.[7]

First, IBM disregards the Commission's findings as to the nature and scope of the activities of resellers of

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Court. The Commission found that the activities of private line resellers will be indistinguishable from other forms of common carriage under the Act. (App. 86b.) The Court of Appeals correctly held that petitioner's efforts to exclude resellers from the definitional provisions of the Act are inconsistent with the express terms of those provisions. (App. 17a-18a.) In these circumstances, the decision of this Court in FPC v. Texaco, 417 U.S. 380 (1974), leaves no doubt that the Commission cannot, as IBM evidently assumes, simply disregard Congress' commands and forbear from all regulation. The Commission has a degree of discretion as to how, but not whether, to regulate resellers and other common carriers under the Act.

[7] At the outset, it should be observed that IBM failed to assert such a definitional claim before the Commission, and hence is now barred by Section 405 of the Act, 47 U.S.C. § 405, from seeking review of that claim. *E.g.*, Cornell Univ. v. FCC, 427 F.2d 680, 684 (D.C. Cir. 1970); Gross v. FCC, 480 F.2d 1288, 1290 (D.C. Cir. 1973). For this reason alone, plenary review by this Court of IBM's claims is clearly inappropriate.

private line services. The Commission specifically found that resellers include not merely brokers and wholesalers, as IBM evidently assumes, but also "processors," who will provide communications services and facilities and offer the resulting "package" for hire to the public. (App. 21b-22b.) Although some resellers may lease all of their facilities and equipment, nothing in the Commission's orders requires them to do so, and the Commission properly anticipated that resellers will purchase or construct at least part of their facilities. (App. 86b.) They can in fact be expected to expend substantial sums for complex equipment and facilities in order to provide telecommunications services. (App. 21b-25b.) Whether they own or lease their equipment and facilities, the Commission found that resellers will retain "continuous control" over the utilization of those facilities. (App. 21b, 24b.) In these circumstances, the Commission reasonably concluded that the activities of resellers will be indistinguishable from "traditional communications common carriage." (App. 86b.)

Second, the Commission emphasized that whether the offeror of an interstate communications service owns or leases its facilities should "not have any regulatory significance." (App. 87b.) This view is strongly supported by long-settled practice under the Act. For example, Western Union, which indisputably is a communications common carrier, in fact "leases a substantial part of its communications facilities now." (App. 87b, n.84.)[8] Similarly, "specialized" carriers, "value-

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[8] Western Union has been a reseller of leased communications services and facilities for many years. *E.g.*, Western Union Tel. Co., 53 F.C.C. 2d 1045 (1975), *aff'd sub nom.* Western Union Tel. Co. v. FCC, 541 F.2d 346 (3d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977).

added" carriers and international record carriers all also lease substantial portions of their facilities. *E.g., Telenet Communications Corp.*, 46 F.C.C. 2d 680 (1974). In accordance with its long-standing regulatory policies, the Commission observed that

> "The public neither cares nor inquires whether the offeror owns or leases the facilities. Resellers will be offering a communications service for hire to the public just as the traditional carriers do. The ultimate test is the nature of the offering to the public. No one contends that resellers will make a private offer of communications service rather than a public offering. Nor will we permit resellers to operate in a discriminatory fashion." (App. 87b.)

Third, IBM's definitional argument cannot stand scrutiny under the Act itself. The definition of "communication by wire" contained in Section 3(a) of the Act certainly refers to "transmission," but the definition is substantially more comprehensive than IBM's argument suggests. The definition carefully provides that the term "transmission" includes

> ". . . all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

Whatever might be the precise limits of that definition,[9] it is certainly sufficiently broad to support the

[9] *E.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969), *reh. denied*, 409 U.S. 898 (1972); United States v. Midwest Video Corp., 406 U.S. 649, 660-61 (1972); General Telephone Co. of the Southwest v. United States, 449 F.2d 846, 853 (5th Cir. 1971).

conclusion reached here by the Commission.[10] As the Commission recognized, resellers will provide their own "facilities" and "services," and will be engaged in the "receipt, forwarding, and delivery" of communications."

There is plainly no occasion for further review by this Court of the Commission's conclusion that private line resellers will be engaged in common carriage. The Commission made findings as to the activities of such resellers, and applied standards to which it has adhered almost from its creation. Neither those findings nor the Commission's long-established standards for the definition of common carriage involves any issue appropriate for review by certiorari. If and when actual experience later shows that resellers, or some of them, are not common carriers, IBM will be free to seek relief from the Commission, as well as review by the courts of the Commission's actions.

[10] Indeed, IBM itself has in the past successfully urged upon the courts the principle that "the FCC's jurisdictional grant should be construed expansively" when its interests were served by extending regulation to others. *Joint Addendum of Intervenors Supporting Respondents*, at page 9, filed in North Carolina Util. Comm'n. v. FCC, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3219 (U.S. Nov. 24, 1977) (No. 76-1675).

[11] It is significant that the Commission specifically predicted a "merging" of the business activities of resellers with those of existing "specialized" carriers, as well as data processing firms, to form a new "information handling industry." (App. 73b.) Since "specialized" carriers are already subject to regulation under the Act, an exemption from regulation for resellers would result in arbitrary differences among firms with competing and interrelated activities.

CONCLUSION

For the reasons described above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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